TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 264

ST. LOUIS–SAN FRANCISCO RAILWAY COMPANY,
PETITIONER,

vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF
IRA S. MILLS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1925

CERTIORARI GRANTED MARCH 9, 1925

(30,841)

(30,841)

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[fols. 1 & 2] [Caption omitted]

[fol. 3] **IN CIRCUIT COURT OF JEFFERSON COUNTY**

SUMMONS

THE STATE OF ALABAMA,
Jefferson County:

Circuit Court

No. 25130

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summons St. Louis and San Francisco Railroad Company, a corporation, to appear before Circuit Court, to be held for said County, at the place of holding the same, within thirty days from service of this process, then and there to answer the complaint of Odell Mills, as Administratrix of the estate of Ira S. Mills, deceased.

Witness my hand, this 31 day of Aug. 1922.

Wm. J. Waldrop, clerk.

IN CIRCUIT COURT OF JEFFERSON COUNTY

COMPLAINT—Filed Aug. 31, 1922

ODELL MILLS, as Administratrix of the Estate of Ira S. Mills, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant

Plaintiff claims of defendant $50,000 as damages, for that heretofore, to-wit, on the 3rd day of August, 1922, plaintiff's intestate, Ira S. Mills, was employed by defendant in commerce between the [fol. 4] State of Alabama and another state or states, or territory of the United States of America, and while defendant was engaged in such commerce between said State of Alabama and said other state or states, or territory, and the said intestate was so employed by defendant in said commerce, he suffered personal injury, as a proximate consequence of which he died, and before his death suffered great mental and physical pain and anguish, and at his death left surviving him his widow, viz: the said Odell Mills, and children.

Plaintiff avers that said injury to said intestate and the said death resulted wholly or in part from the negligence of the officers, agents, or employes of defendant, for all of which plaintiff sues for the benefit of herself, as the widow, and of the said children of intestate, under an Act of the Congress of the United States, known as Federal Employer's Liability Act, of 1908, as amended.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

Plaintiff demands a trial by jury of the above styled cause.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[File endorsement omitted.]

Sheriff's Return

Executed this the 25th day of September, 1922, on St. Louis-San Francisco Railroad Company, a corporation, by leaving a copy of within with C. J. Snook, agent of said Company.

J. C. Hartsfield, Sheriff, by J. E. Matlock, D. S.

[fol. 5] In Circuit Court of Jefferson County

[Title omitted]

Notice of Petition for Removal

To Harsh, Harsh & Harsh, Attorneys of Record for Plaintiff:

Take notice that the defendant will, on the 27th day of September, 1922, at 9 o'clock A. M., or as soon thereafter as counsel can be heard, move the Honorable Dan A. Greene, Judge of the Circuit Court of Jefferson County, Alabama, or if he be not available, some other Judge of the said Circuit Court, for an order removing this cause to the District Court of the United States for the Southern Division of the Northern District of Alabama, in accordance with the petition and bond of defendant, copies of which are hereto attached and served upon you.

Done this 25th day of September, 1922.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

We hereby accept service of the above notice, together with receipt of a true copy of the same and of true copies of the petition and bond of the defendant referred to in said notice.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[fol. 6] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

PETITION FOR REMOVAL

To the Honorable the Judges of the Circuit Court of Jefferson County, Alabama:

The petition of St. Louis-San Francisco Railway Company, the defendant in this cause, respectfully shows that this suit was instituted against this defendant in the Circuit Court of Jefferson County, Alabama, on the 31st day of August, 1922, and that the summons and complaint in said action was served upon defendant on, to-wit the 2nd day of September, 1922; that this defendant is the sole defendant in said cause, and that the time for appearing and pleading in said action under the statutes of Alabama and the rules and practice of this court has not expired; that at the time said suit was begun, and at the present time, the plaintiff was and still is, a citizen and resident of the State of Alabama, and that the defendant was at all such times, and still is, a corporation organized and existing under and by virtue of the laws of the State of Missouri, having its chief office and place of business in St. Louis, in said State, and is as such, a citizen and resident of the State of Missouri, within the meaning of the Acts of Congress relating to the removal of causes; [fol. 7] that the amount in controversy in said suit exceeds the sum of three thousand dollars ($3,000.00), exclusive of interests and costs, and that this is a suit wholly between citizens of different states, with- the meaning of the Acts of Congress relating to the removal of causes.

The defendant herewith files its bond with good and sufficient surety for its entering into the District Court of the United States for the Southern Division of the Northern District of Alabama, within thirty days from the filing of this petition, a certified copy of the record in said suit and for the payment of all costs that may be awarded by the said District Court if said court shall hold that such suit was wrongfully or improperly removed thereto.

Wherefore defendant prays this Honorable Court that this petition and bond may be accepted and approved, and said suit removed into the District Court of the United States for the Southern Division of the Northern District of Alabama, and that this court proceed no further in the premises.

St. Louis-San Francisco Railway Company, by Cabaniss, Johnston, Cocke & Cabaniss, Its Attorneys.

Sworn to by W. R. C. Cocke. Jurat omitted in printing.

[fols. 8 & 9] BOND ON REMOVAL FOR $500—Approved and filed September 27, 1922; omitted in printing

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[fol. 10] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

ORDER FOR REMOVAL—Filed Sept. 27, 1922

The defendant herein having within the time provided by law, filed its petition for removal of this cause to the District Court of the United States, for the Southern Division of the Northern District of Alabama, and having at the same time offered its bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety, pursuant to statute and conditioned according to law.

Now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the District Court of the United States for the Southern Division of the Northern District of Alabama, pursuant to the statutes of the United States, and that all further proceedings in this court be stayed in this cause; and the Clerk of this Court is hereby ordered and directed to make a copy or transcript of the record in said cause, for transmission to the said District Court of the United States.

Done this 27th day of September, 1922.

Dan A. Greene, Circuit Judge.

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF JEFFERSON COUNTY

CLERK'S CERTIFICATE

I, William J. Waldrop, Clerk of the Circuit Court for the Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing pages numbered from one (1) to seven (7) both inclusive contain a full, true and correct transcript of the Summons and Complaint, Sheriff's Return, Notice, Petition, Affidavit, Bond and Order for Removal in the case of Odell Mills, as Administratrix of the estate of Ira S. Mills, deceased, Plaintiff versus St. Louis-San Francisco Railroad Company, a corporation, Defendant.

I further certify that the costs that have accrued in the above case up to the present date amounts to the sum of $13.60.

All of which appears of record in this court and all of which I certify to the District Court of the United States for the Southern Division of the Northern District of Alabama.

Witness my hand and seal of this court, on this the 28th day of September, 1922.

Wm. J. Waldrop, Clerk Circuit Court for the Tenth Judicial Circuit of Alabama. (Seal.)

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2838.

ODELL MILLS, as Administratrix of the Estate of Ira S. Mills, Deceased, Plaintiff,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant

AMENDMENT TO COMPLAINT—Filed Feb. 26, 1924

Comes plaintiff and by leave of the court amends her summons and complaint in the above styled cause in the following particulars, viz.,

1. By correcting the name of defendant corporation wherever it occurs in said summons and complaint so that same will read "St. Louis-San Francisco Railway Company" instead of as it now appears.

2. Plaintiff strikes the word "children" wherever it occurs in said complaint and in lieu thereof inserts the word "child."

3. Plaintiff adds at the end of the first count of her complaint immediately before the signature thereto, the following, viz., Plaintiff further avers that at the time of the said injury and death of plaintiff's said intestate this defendant was engaged in the business of a common carrier in interstate commerce and that the said intestate at said time was employed by said defendant in such interstate commerce and was engaged in or about performing duties for the defendant in the line and scope of his said employment by defendant. Plaintiff further avers that plaintiff's said intestate left [fol. 13] surviving him his widow, Odell Mills, and one minor child, viz., Kermit Mills, of the age of to-wit: three years, both of whom were dependent upon said intestate for support and are entitled to the benefits of any recovery on account of his death under the Federal Employer's Liability Act.

Plaintiff further avers that the said injuries and death of plaintiff's said intestate resulted either wholly or in part from the negligence of an officer, agent or employee of defendant, acting within the line and scope of his employment or authority by defendant and said death of plaintiff's said intestate was due to the negligence of said officer, agent or employee of defendant while acting within the line and scope of his employment or authority, as aforesaid.

Harsh, Harsh & Harsh, Attorneys for Plaintiff.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed October 4, 1922

And now comes St. Louis-San Francisco Railway Company, a corporation, defendant in the above-styled cause, by counsel, and demurs to the complaint herein upon the following special grounds:

(1) Said complaint states no cause of action against this defendant.

(2) It does not appear from the averments of said complaint that this defendant violated any duty that it owed plaintiff's intestate in the premises.

(3) Said complaint states no cause of action against this defendant either at common law or under the Federal Employers' Liability Act.

(4) Said complaint fails to state a cause of action against this defendant under the Federal Employers' Liability Act, in that said [fol. 15] complaint fails to aver or show that at the time of the injury and death of plaintiff's intestate this defendant was engaged in the business of a common carrier in interstate commerce and that the said intestate at the time of his said injury and death was employed by this defendant in such commerce.

(5) It does not appear from the averments of said complaint that at the time of his alleged injury and death plaintiff's intestate was performing duties for the defendant within the line and scope of his employment by defendant.

(6) It does not appear from the averments of said complaint that plaintiff's intestate left surviving him, any persons dependent upon him for support, and entitled to the benefits of any recovery under the Federal Employers' Liability Act.

(7) It does not appear from the averments of said complaint that the injury and death of plaintiff's intestate resulted either wholly or in part, from the negligence of any officer, agent or employee of defendant acting within the line and scope of their employment or authority by defendant.

(8) It does not appear from the averments of said complaint that the alleged injury and death of plaintiff's intestate was due to the negligence of any person for whose acts or omissions this defendant would be liable or responsible.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

[fol. 16] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—February 26, 1924

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment; Present, Honorable W. I. Grubb, United State District Judge, Northern District of Alabama, presiding; Honorable Charles B. Kennamer, United States Attorney; Thos. J. Kennamer, United States Marshal, and Chas. J. Allison, Clerk.

This cause coming on to be heard, this day, come the parties herein by counsel and in person, and plaintiff by leave of the court first had and obtained amends complaint, by separate paper this day filed, by adding Kermit Mills, 3 years old, a beneficiary under the Federal Employer's Liability Act;

Thereupon issue being joined on plaintiff's complaint as amended and defendant's plea of general issue pleaded in short by consent, with leave to give in evidence any matter which if well pleaded, would be admissible in defense of action, to have effect as if so pleaded and with leave to the plaintiff to give in evidence any matter, which if well pleaded, would be admissible in reply to such defensive matter, to have effect as if so pleaded, to try this cause comes a jury of good and lawful men, to-wit, Robert Adams and eleven others duly empanelled, tried and sworn and the trial of this cause is begun.

[fol. 17] During the introduction of the evidence, the daily hour of adjournment having arrived, it is ordered by the court that this cause be continued until tomorrow morning nine o'clock.

IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—February 27, 1924

This being the day and hour to which this cause was on yesterday continued, come again the parties herein by counsel and in person, comes also the jury heretofore selected, empanelled, tried and sworn and the trial of this cause is resumed.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court, the following verdict, which was read by the clerk, to-wit: "We the jury find for the plaintiff and assess her damages at the sum of $13,750.00; $8,750.00 to go to Odell Mills and $5,000.00 to Kermit Mills. Rob Adams, Foreman."

JUDGMENT

Thereupon it is ordered, adjudged and decreed by the court that said plaintiffs, Odell Mills have and recover of and from the defendant the sum of Eight Thousand, Seven Hundred and Fifty Dollars ($8,750.00), and that Kermit Mills have and recover of and from the defendant the sum of Five Thousand Dollars ($5,000.00) making a total sum of Thirteen Thousand Seven Hundred and Fifty Dollars ($13,750.00) together with all costs herein accrured, for which judgment and costs an execution may issue.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions—Filed May 19, 1924

CAPTION

Be it remembered, that upon the trial of the above styled cause before the Honorable W. I. Grubb, Judge of the District Court of the United States for the Southern Division of the Northern District of Alabama, and a jury, on the 26th day of Febraury, 1924, the following proceedings not otherwise appearing of record, were had, towit:

J. H. STEPNEY, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is J. H. Stepney. On the night of August 3rd, 1922, when Mr. Mills was killed, I was on the street car. Before Mr. Mills was killed I saw three men get on the same car—I don't know the different stations now on that line, but one man got on [fol. 19] at the I. C crossing, and I think he was a railroad man, I don't know, he had a lantern in his hand; and the next two men got on at the next station—I don't know what station it was. And when the car run in the switch, making up near the colored playground, when it threw the reflection on this station I saw two men and a woman standing there. The car hadn't reached there; it was at the switch; that was the first station it stopped at after that. There were two white men and a colored woman. These men stopped on the back platform and rode there. When the car left this station the conductor went back there and collected, and when he collected he came back to the front platform; and the next station I was going to get off—I think it is called McClure's Station right there by the cemetery—and when I rang for the car to stop there, just before it came to a standstill the shooting commenced. The shooting came from the rear platform. I don't

know what became of Mr. Mills; I didn't know anybody personally—any of the white people personally. I learned afterwards, but not on that night, that it was Mr. Mills that was killed there. I don't know how many shots were fired.

Cross-examination:

The colored people sat in the front part of this car; we were toward the front, and I had my back toward the back platform the way we were sitting. I am not positive whether it was two or three men that got on and stood on the back platform, but I know it was as many as two. I got on the car at Thirty-seventh Street, Ensley, or Fairfield, or whatever you might call it. As far as I know, these men stayed on the back platform all the time, and never came into the car until the shooting started. I don't know whether they came into the car at any time during the shooting, [fol. 20] because I was afraid to look around. When the shooting started I tried to get out, but I couldn't. You ask the question, "You didn't turn around?" I answer, Yes sir. I just looked once and saw the flash from the pistol. I was inside the car; I never had left my seat. The flash came from the back platform; all the shots seemed to be made at the same time. I heard no threats or anything going on before the shooting indicating that any trouble was brewing; I didn't hear any words at all. I was in the colored compartment of the car.

By the Court:

Q. Were there two people at the station—you say there were two white men, you say, that got on the back platform?
A. Yes, sir.

By Mr. Harsh:

Q. Were the two white men, were they with the colored woman, or were they separate from her?
A. The colored woman was standing at this end of the station, and the white people were at the other end. The woman was standing with her back to the porch, with her back up to the cement of the porch.

It was agreed between the parties that when the word Frisco is used it is to be taken to mean the defendant company.

L. L. Jenkins, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is L. L. Jenkins. On the 3rd day of August, 1922, the night that Mr. Ira S. Mills was killed, I was a guard for the St. Louis-San Francisco Railway Company; I was on day duty at

that time. I had known Mr. Mills from Monday of that week, until he was killed, Thursday night, I think it was. He roomed next [fol. 21] door to my house, and worked for the Frisco at East Thomas Yards. When I say Frisco, I mean St. Louis-San Francisco Railway Company. His job was car inspector. I guarded him lots of times while he was engaged in doing it. Well, that was his regular job. I saw him that afternoon; he came on at three, then I had charge of guarding him until seven when I went off duty. From that time until seven o'clock when I went off duty that night he was inspecting trains—freights. Mr. Mills was on duty from three till eleven p. m. We made up one train just before I left there, that was scheduled to go to Mississippi. Well, that was the orders. He inspected that train. I left him just as he went through the train. That was a St. Louis-San Francisco Railway Company train. I went home. At the time he was killed, Mr. Mills had been in the employ of the St. Louis-San Francisco Railway Company about three days, I think. I do not know what his wages were; I do not know what the wages of a car inspector were at that time. He was inspecting trains in the East Thomas yards, in Birmingham, Ala. He was rooming at 810 North Eighteenth Street, in Birmingham. I was an employee of the defendant company and was employed to take care of these men. There was a strike of the former employees of the Frisco in progress at the time, and I was employed as a guard.

At this point counsel for the plaintiff asked the witness the following question:

"Q. About how many men were there on strike at that time, if you have any idea; were there considerable or few?"

The defendant objected to the question upon the ground that it [fol. 22] had no bearing upon any issue in the case. The Court overruled the objection and the defendant in open court duly and legally excepted, and the witness answered:

"A. It seems to be there was good many; all that had been there was on a strike." I declare I don't know how many worked there; a considerable number of men. There had been threats of violence to the men who were working, like Mr. Mills, but not to me. I heard them making the threats one evening as I was bringing a crowd of men out; I heard the threats as to what they were going to do, but they were not talking directly to me, though. Well, there was about eight or ten men standing at the end of the yard on the Acipco car line when I brought out the workmen, bringing them home; and there was some of the men in the crowd made the remark that, "Here is some one that I'm going to get," and I just went on through the crowd and pushed on through, and would not let them even stop at all. The men making these threats were strikers. That is the only time I ever saw the crowd out there when I brought them out.

At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, did you report that—to the Company?"

The defendant objected to the question upon the ground that it had no bearing upon any issue in the case. The Court overruled the objection, the defendant in open court duly and legally excepted, and the witness answered:

I reported that to my superior officers of the Company. That was [fol. 23] about a week or ten days before the night Mr. Mills was killed. I reported it to Mr. George Tyler. He was supposed to be the sergeant over the police.

He was in charge of the Company guards; yes, sir. Mr. Mills came to my house about 12:15 the same night he was shot, after he was shot, and I saw his wounds. Why, he had five bullet holes in him; there was one in each arm, and one in the stomach, and one hit him in the back and came through and the ball lodged right under here (indicating), and there was one went through the thigh. He died the next day; I don't know just what time; I was at work and I don't know just what time he died. Yes, sir, he was an active, healthy looking man up to the time that he came home shot. Yes, sir, he talked just as strong as ever.

Cross-examination:

I had been on guard at the Thomas yard. Those were the joint yards for the inspection and handling of trains of the St. Louis-San Francisco Railway Company, the Illinois Central Railroad Company and the Central of Georgia Railway Company; yes, sir. Mr. Mills did not do joint work while I was there. Each road had inspectors there. I don't know about any joint work of the inspectors in joint movements of the cars. About seven o'clock that night was the last time I saw Mr. Mills before he was shot, and I know nothing at all about what he did between seven o'clock that night and the time that he was shot. I went off duty at that time; at seven o'clock. No, I didn't see the orders of the train, to go to Amory, but that is what the engineer was raising sand with him to get it ready; he said he had to go to Columbus. That is the way I got my information that the train was to go to Amory; I did not see the orders. All that I [fol. 24] know is what the engineer told. I do not recall any other specific car that I saw him inspect that night, of which of my own knowledge I knew the destination; I did not go around and examine them to see where they were going. Of course, I could have. But I have seen him inspecting trains that were marked to different places, but on this night I don't know whether I even noticed it or not. I don't remember that I saw him do anything of the sort on that particular night, or on that afternoon; I did not go around and examine to see where they were going. There were all sorts of cars in the yard—cars that had interstate destinations, and some that were moving around in Birmingham, and some that were out of repair.

Mr. Mills was a car inspector, he inspected the trains and made light repairs. He inspected a Frisco train that evening. At the time of my employment as an officer of the Frisco I had a deputy sheriff's badge and license. I couldn't tell you how many there were employed there as guards or deputies at that time; I am satisfied there was fifty or seventy-five. I know when they moved over here on the night force I had forty-four the first night. Yes, sir, there was a large number of deputies all right. I had about five or six men at the Thomas yards under my protection. And over here—when they moved me over here I don't know how many there was; there was fifty or seventy-five. I was moved over to Ninth Avenue. When I was working at the Thomas yards I had something like five or six men under my protection. Whenever they quit work, or went to work, I went with them to protect them; yes, sir.

Redirect examination:

The Frisco Railroad employed and paid me as a deputy sheriff. At the Ninth Avenue yard at one time I had forty-four men under [fol. 25] me; I had to see after them; I made the round every hour. Attorney for defendant admitted that the guards were employed and paid by defendant.

Recross examination:

I just had charge of going around and seeing that they were on the job.

By the Court:

Q. Was this train headed west?

A. It was headed west.

It was not coming to Birmingham; it was going the other way.

I think the eastern terminus of the Frisco Railroad is Birmingham, and was at that time.

A. D. Weathers, a witness for the plaintiff, being first duly sworn, testified as follows:

My name is A. D. Weathers and I am working for the L. & N. Railroad Company at Albany, Alabama, in car repairing. I knew Mr. Ira S. Mills and I was with him at the time he was killed. I had been working with him some three or four days before and up to the time he was killed; we were car inspectors, inspecting cars for the Frisco Railroad; I was doing that all the time that Mr. Mills worked there; he had been working there some three or four days when he got killed; I don't remember. I had been working longer; I went in somewhere in July, about ten days, I suppose, after the strike—somewhere near the 10th; I don't remember just the day that I started to work, but it was somewhere right along the 10th. It was about twenty-five minutes to twelve at night that Mr. Mills got killed. We got off at eleven o'clock and were both on our way home, to our

respective homes, at the time he was killed. A guard by the name of Cantrell was with us; he was a young man, I would not take him [fol. 26] to be over twenty or twenty-one years old. He was a guard in the employ of the Frisco. I was unarmed; Mr. Mills was armed. Yes, sir, I know what happened on the car.

We got off from work at eleven o'clock, come over to a place on the Pratt-Ensley car line—I disremember the name right now, but it was right near the East Thomas stop, to get on the car. There was myself, Mr. Mills, and this guard, Cantrell. He came with us. When we got on this car, there were three men standing on the platform, on the rear platform. We hadn't went but just a short ways, say past maybe one or two stops—it was only a short ways—when there was some one got me by the arm, and they said "Get on off here, Get on off, Your days are come," with an oath. I raised up to my feet, grabbed this man's gun that had it in my face—one of those three men. At the same time, everybody began to shoot, and I saw Mr. Mills fall over a seat in the street car. I couldn't tell who started the shooting, because everybody started to shooting, it seemed like to me, at the same time. I don't think Mr. Cantrell did any of the shooting. Mr. Cantrell got out of the window and by the time I got up, Mr. Cantrell was gone. The man got a hold of me the time the street car stopped, I got up, I got out of the window, I couldn't see anybody but Mr. Mills. The man got a hold of my arm, and when I raised up and had my eyes on the man, I had my eyes on the man that had the gun on me; I wasn't looking to see who had disappeared; and I grabbed the gun, and by the time I grabbed the gun some one began to shoot. Now, which way the first shot was fired from, I couldn't tell, but they began to shoot, and I looked and seen Mr. Mills fall over this way, and I jumped out of the window on the opposite side. Now, Mr. Mills was the only man that I seen when I [fol. 27] looked back that way, when I first looked. I didn't see Cantrell at that time. Up to that time Cantrell and Mills were sitting on the seat that was running this way (indicating) to the car on the right hand side, and I was sitting on the left hand side coming to town; and Mr. Cantrell was sitting back next to the platform. I was sitting on the left hand side and they were sitting on the right. Yes, sir, they were sitting on the same side of the car; Mr. Mills was sitting up towards the front and Mr. Cantrell was sitting toward the back platform. There are two little seats on the back that run along that way. I was sitting on the left hand side on one, coming to town; and Mr. Mills and Mr. Cantrell were on the one on the right. I couldn't tell whether or not the first shots came from the back platform or from the seat that Mills and Cantrell were on, because there was just some shooting, and that is all I know; I couldn't tell which way the first shots were fired, or anything. I recognized these men; I had seen them before. I would say they were strikers, yes, sir. I had been threatened by the strikers before, and I had reported it to someone for the company to Mr. Tyler, the boss of the guards. Well, on Sunday night before Mr. Mills was killed on Thursday night, was when I got my first tip that they were after me, and I called Ser-

geant Tyler; and then on, I believe it was Tuesday night—Monday night nothing happened—Tuesday night I heard it again; Tuesday night he told me to come on and get off at the usual place. Mr. Tyler told me on Tuesday night to come on and get off at the usual place and he would have some one there to meet me. When I got off there, there was two men to meet me, and there was a United States deputy marshal and one of the guards was there to meet me when I got off there that night. Well, Thursday evening I was back [fol. 28] at the office again, the office of the company, and I heard a switchman discussing over the telephone, stating to some one where I got on the car at, telling just exactly, and I was standing right behind him, and he said, "Bill, I'll call you again," and I picked up the receiver and called my wife, and called Sergeant Tyler and reported it again; and Sergeant Tyler said there was no need to be scared, it was just a bluff. I told the boss of the guards. Mr. Tyler was the boss of the guards, and then I went and found the man they had for boss out there, Bill Wilkins, I won't be positive, and then I went and told Mr. Wilkins about it. Mr. Cantress was the guard assigned to take Mr. Mills and myself home, the same man I have been talking about.

At this point counsel for the plaintiff asked the witness the following question:

"Q. What kind of a man was he? How did he act?"

The defendant objected to the question upon the ground that it called for a conclusion, the Court overruled the objection, and the defendant then and there in open court duly and legally excepted. Thereupon, without the witness answering the question, counsel for the plaintiff asked the witness the following question:

"Q. Describe as best you can, how he acted as guard?"

The defendant objected to the question, the Court overruled the objection, and the defendant then and there in open court, duly and legally excepted, and the witness answered:

"A. Well, he was just a great big bluff."

[fol. 29] The witness testified as follows: "He was always taking his gun and talking about he would like to shoot a man." Whereupon the Court cautioned the witness to state the facts. The witness then stated: "Well, I want to tell Your Honor that he was such a coward that I went back and told Mr. Tyler." Whereupon the Court then reprimanded the witness and instructed him to state the facts and not give his opinion about it. The witness then testified:

He was nervous and showed that he was scared and I reported these facts to Mr. Tyler, my superior. This was on Thursday evening before Mr. Mills was killed on Thursday night. Mr. Tyler sent out the same guard with us. Mr. Cantrell got on the car with the butt of his pistol showing from under his coat; one of the three men that got on the car looked at the other and laughed. That was the only

comment that was made. The other one—one of them looked at the butt of his gun and looked at Mr. Cantrell and laughed. If there were any other remarks I couldn't say. I was sitting right opposite Mr. Cantrell and Mr. Mills. No, sir, Cantrell did not shoot, that I know of. It was a very short while from the time the man caught hold of me, before I looked aound, but I couldn't give you just the definite time; it was just a very short time, because the whole thing, I don't suppose, would have lasted over fifty seconds or a minute; the whole thing, the whole shooting, the whole thing was over in almost the fraction of a minute; and when I looked around Mr. Mills had fallen across the seat. I couldn't tell you what became of Mr. Mills because I left him on the street car, and went to the hospital looking for him and before he got at the hospital; they brought him to the hospital a short time after I got to the hospital. He died the next day. Mr. Mills was not present at any time when I was talking [fol. 30] with Mr. Tyler. He was with me when I was talking to Mr. Wilkins. At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, what were you talking to Mr. Wilkins about?"

The defendant objected to the question upon the ground that it was not shown that any talk with Winkins was binding on the defendant,

whereupon, the Court asked the following question:

"Q. What was his job?" and the witness answered:

"A. He was an officer out there. He was over the men that was at East Thomas yard."

He was one of the Frisco guards. Well, he was over the men at East Thomas; the guards, yes, sir.

At this point counsel for the plaintiff asked the witness the following question:

"Q. Well, what was said by him in the presence of Mr. Mills?"

The defendant objected to the question upon the ground that what was said in the presence of Mills would not be competent evidence, and because it was not shown that any talk between Weathers and Wilkins was binding on the defendant or that it had any bearing on any issue in the case, and that it called for immaterial, irrelevant, incompetent and illegal testimony. The Court overruled the objection, and the defendant then and there in open court duly and legally excepted, and the witness answered:

[fol. 31] "A. I just told Mr. Wilkins the conversation I had heard over the telephone. Mr. Mills was with me. We had went up to the office up to where Mr. Wilkins was staying in a little shack up there, and I related to Mr. Wilkins what I heard over the telephone."

Thereupon, counsel for the plaintiff asked the witness immediately thereafter, the following question:

Q. And what did he say?"

The defendant objected to the question upon the same grounds assigned in the objection to the previous question, the Court overruled the objection, and the defendant then and there in open court, duly and legally excepted, and the witness answered:

"A. He said it was just a bluff, that they were not going to bother us at all, just to go on home and pay them no attention at all, that they were not going to bother us."

I couldn't estimate how many guards the Frisco had to guard the men who were taking the places of the strikers, only just at East Thomas. There were about seven on at East Thomas in the day time, and maybe the same number at night. Guards, yes, sir; there was only one man on most of the time at East Thomas as car inspector, just one man. That was Mr. Mills as car inspector at night. East Thomas is a joint yard between the Frisco, the Central of Georgia and the I. C. Mr. Cantrell, the guard who was with me, was present during the conversation I had with Mr. Wilkins at East Thomas; he went along with us. He went with me everywhere I went in the yard, and he was with me and Mr. Mills. My job was car inspector. Mr. [fol. 32] Mills and I went together all the time; we were joint inspectors of the same trains; yes, sir. I knew Mr. Jenkins, the day guard. He was on duty up until—I don't remember just the hour that they changed—but he was on duty there whenever Mr. Mills and I went to work in the afternoon. On the afternoon of the day that Mr. Mills was killed, we went to work at three o'clock. From that time until we got off, Mr. Mills and I were looking after incoming trains and looking after the trains that they were making up on an outgoing train, and taking care of the transfers. I disremember the number of the last train that we inspected, but it was a Frisco train going west; going out for Amory, Mississippi. We started that train in the afternoon. I found an L. & N. coal car that wouldn't pass interchange, and I had thrown it out, and when the engineer kicked it back off the siding, pulled it back off the switch, he didn't kick it far enough, and he came up there on it; as he passed by it caught part of his engine and it tore off part of the pipes on the tender of his engine and it put his engine out of commission; his engine had to go back to the roundhouse and get another engine before the freight could go out. Yes, sir, we inspected other interstate trains that night; we had one train from Amory and a coal train from Dora coming in. About the last thing we did before we left, was to get that train out—the train going to Amory. We got it out somewhere about after ten o'clock, the train going out. That was about the last thing that we did before we were relieved from the night men, and the morning men came on. We were paid wages of sixty-three cents an hour. We had been working twelve hours a day up until Mr. Mills came over. When Mr. Mills came over we had enough men to give two men on the shift and we were only working eight hours at [fol. 33] the time Mr. Mills was killed. Mr. Mills was a competent workman. Mr. Mills worked regularly all the time he was there; so

far as I know, he was a sober, industrious man. I had not known him before the beginning of that week when I began to work with him. I do not know how many Frisco men employed at that place were out on strike at that time. You mean at East Thomas? If I am not mistaken there was only seven on strike out there at East Thomas, where I was working. All of the old men, car inspectors and car repairers at other places in the district were out on strike, and we had taken the place of the strikers. I saw Mr. Mills in the hospital before he died. When they brought him in that night, he just told me, "Well, Weathers, old boy, they've got me; they've shot me all to pieces"; and then I seen him the next morning and he just told me they kicked him off the car, but he didn't tell me how he was suffering or anything. Of course he was in pain; he said he was in pain, but he didn't show any emotion.

Cross-examination:

We left the yards that night about fifteen minutes past eleven; something like that. We got through inspecting the train that was going to Amory somewhere between ten and eleven; I don't remember just the time. We did nothing at all after that except taking our lanterns and wrenches and what few hose we had in our arms back up to the shacks, and go and turn our reports in to the office, and by that time the night men were there and we washed and cleaned up. I wouldn't think it was over a half mile from the yards to where we had to walk to take the car. We were not molested going from the yards to the station; I have forgotten that station; I don't remember whether it was Weaver or McClure. Prior to the [fol. 34] shooting Mr. Mills was sitting on the right of the car on the rear end and on the seat running this way (indicating) on the right, up next to the first seat running this way (indicating) crossways of the car; and Mr. Cantrell was back towards the platform, closest to the platform, and I was sitting on the same kind of seat across the aisle from him. The men on the back platform that were involved in the shooting were on the car when I got on. It was only a very few minutes from the time I got on until the shooting began; we had passed just one station—the negro park. The three men on the back platform said nothing to me, or to Mr. Mills or Cantrell; they made no remarks to me and no threats against me; one of them looked at Cantrell and laughed. When the man caught hold of me, I was kind of leaning back kind of to the side, this way, not looking exactly towards the front, but looking kind of in this position here (indicating). My attention was first attracted just as the car stopped, by this man coming up and putting his hand on my shoulder. He told me to get off, my days had come, with an oath. He didn't do or say anything to Mr. Mills. Why, the shooting commenced by the time the words got out of his mouth. The three men on the back platform all shot, I think, but I don't know whether this fellow whose gun I had shot, I couldn't tell; the others shot; the shots came from that direction. It is my best recollection

that those three men on the back platform started the shooting. I couldn't tell how long it was after I was engaged in the struggle with this man who had the gun on me before the shooting began; we both turned it loose about the same time; I let it fall in the aisle and so did he, and I went out of the window and I don't know which way he went. I don't know what became of the other two men on the platform. I couldn't tell you how many shots were fired, and I [fol. 35] don't know exactly in what direction each of the shots came from, because some one shot after me after I got out of the car. Mr. Mills was armed; I saw his pistol at the coroner's inquest and it had one cartridge fired out of it. The whole thing happened in a very few seconds; it started and was over almost at the same time; that was about the way it was. I wasn't paying any particular attention to where Mr. Cantrell was; I wasn't looking out for any one but myself; I can't say whether he shot or not. When the shooting was over and I looked around, Cantrell was no longer in the car, and the men who started the shooting were no longer in the car, either; at least, I didn't see them.

The car had just come to a stop when the shooting began. As I went around the car, come around the car, why, some one from the front end of the car opened fire on me again, shot at me three times from the front end of the car; I did not look around to see whether it was from the ground or from the inside of the car; I just know it was from the front end of the car; I just know it because I got some powder on my sleeve. I jumped out of the window of the car on the same side that I had been sitting on. I couldn't tell you how long it was after the man grabbed me and put his gun on me, before I went out of the window; times was too valuable for me to count it; I couldn't tell you; I got out as quick as I could. No, sir, Cantrell wasn't a large man; he was a full, slim boy. I don't know of my own knowledge what his age was; it is just my judgment that he was twenty or twenty-one. He had been acting as guard for Mr. Mills and myself together for just two days, but he had been guard with me for something like a week or more. Prior to that time I had encountered some trouble while Cantrell was with [fol. 36] me. Mr. Cantrell run and left me down there with a train out across the road and wouldn't stay down there with me. Mr. Cantrell left me down the road going out beyond East Thomas one time; the train broke loose and he wouldn't go down there with me because there was some men down there. Yes, sir, he ran and left me by myself. Well, he left me by the office; I don't know that he actually ran, but he actually left me and went back to the office. No, sir, that was not at Ninth Avenue. We had made a train up, and the train started across, going west, towards Pratt City; and right after crossing the road down there, between there and the street car line, the train broke loose; and when it broke loose, why, I had went down there to inspect the trouble; and when we crossed the road there, why, Mr. Cantrell wouldn't go with me any further. Yes, sir, there were some pickets down there; there were four or five men sitting in a Ford automobile; I didn't know them at all; I don't know who they were. I went on by myself after Mr. Cantrell

left me on that occasion. The men sitting in the automobile called me "scab" and "scaly," and told me that they would get me, but they did not offer me any violence on that afternoon.

JOHN JORDAN, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

I work on a section, of the L. & N. Railroad. I was on the street car on the night of August 3rd, 1922, when Mr. Mills was killed or shot. I saw some men on the back platform of the car shortly before Mr. Mills was shot. Yes, sir, I saw somebody go back to them and speak to them. The motorman, he goes back—or the conductor, he goes back there and talks to them; and just a little before he gets [fol. 37] to the place where the shooting was done at, he takes up fares of some more folks that got on, that I doesn't know, at stops. So when he gets up to where they done the shooting at, just before, a little before he gets up to where they done the shooting at, he comes up to the motorman—I say just before he got another stop down there—I don't know the name of none of them stops down there—he goes back there and he talks to these three fellows, and then he takes up the fare before he gets to the place where the shooting was done at; and then he goes up here where the motorman was at and stood up by this tin behind the motorman; and just as the car rolled up, the shooting takes place, and I turned the fan on. I turned and run—I turned the fan on. The tin that he stood on just before the shooting was done, was this tin right behind the motorman; there's a tin behind the motorman and the door when you go in the car; I calls it tin; yes, sir, some metal; I don't know what it was, but I calls it tin. That was between the motorman and the inside of the car; yes, sir, and the conductor got behind that; he got on the same side that the motorman was on, in the front.

I couldn't hear what the conductor and these men on the back platform were talking about before that. The shooting began just as the car rolled up there for some lady there at that stop, and somebody rang the bell for to get off. A colored woman got on there. I didn't notice whether there were any white men on the ground before the car stopped. I didn't know Mr. Mills; I didn't know any of them at all, that was shot.

(No cross-examination).

MARY LUCAS, a witness for the plaintiff, being first duly sworn, testified as follows:

[fol. 38] Direct examination:

My name is Mary Lucas. I was at the station on the street car line on the night of August 3, 1922, the night that Mr. Mills is said to have been killed. I was waiting there to get on the car, and there were also two white men waiting there. I was on the left hand side of the car as it came towards town, facing the side they boarded the car on. I did not see any white men get off the car before the shooting, but I did see some men running from the car after the shooting; I couldn't tell how many there were; there was so many of them I couldn't tell; I could only see them in the glare of the electric lights from the car. I don't know whether I saw Mr. Mills, the man who was shot, or not; I remember seeing one man with a light suit on; I don't know whether that was the man or not—and a straw hat; he was running across the street under a light. He was by himself and crossed the track, that is why I saw him. The others went up the track, seemingly—the other people that I saw running. Why, I didn't get on the car. No, sir, I hadn't gotten on the car then when that happened. I only saw the man shot on the car, and I got on; he was standing up in front of the car in the middle of the aisle.

Cross-examination:

I saw one man cross the track after the shooting. He was dressed in a light suit and had on a straw hat. I couldn't tell how many went up the track; I saw the people running. Those two men that I saw standing there, they didn't go up the track at all; they went up the hill, I think; I didn't see them. Well, I saw several people get off the car there; I think Mr. Stepney and Mr. Roper and Mrs. Reuser and Mr. Ross—I knew them—and the motorman, I know [fol. 39] them personally. They was all supposed to get off the car there, that was the last stop, they was supposed to get off there like I did. I didn't see anybody come through the windows. The man I saw cross the track went on up towards the Jewish cemetery; he was running, and was dressed in a light suit and a straw hat. That was the only person I saw that was running. Of course, there was other people going up the track, I couldn't see them good. I didn't see him go off the track. He was a white man that I saw cross the track. I didn't see him get off the car because he got off the back, and I was standing in the front; he got off at the back entrance.

JULIA ROSS, a witness for the plaintiff, being first duly sworn, testified as follows:

I was a passenger on the street car on which Mr. Mills was shot, on the night of August 3, 1922, and I saw three men on the back platform before the shooting. These men got on at the City League

station. This was about four —about four stations before the shooting occurred. I seen the conductor go back and talk with them, but I don't remember anybody else talking with them. I don't remember what he did after that, no more than he walked back up there and talked with the motorman, but I don't remember anything else that he did. After the conductor went up there where the motorman was, the shooting taken place then, but I had gotten up and walked to the front end of the car. I was sitting on the lefthand side of the car, coming to town. I remember seeing two men sitting opposite me on the long seat that runs lengthways the car, across the aisle from me, in the back end of the car. Yes, sir, I saw them when the shooting taken place at the back end. One of these men was one of the men that was shot; there were two men [fol. 40] that were shot and one woman. I couldn't tell just exactly who did the shooting, because I was getting off the car; it was my time to get off, and I had gotten up to get off, but of course I saw the light of the balls and heard the report of the gun, but I couldn't tell directly who was shooting because—the shooting seemed to come from the back end of the car. I did not see either of those men sitting on the long seat shoot. All the shooting that I heard seemed to come from the back platform of the car; the red balls. I saw it from the back end of the car.- I couldn't tell just exactly how many shots were fired, because it sounded just exactly like pop corn in a pan to me. Yes, sir, there were several of them. No, sir, I don't know what became of the two men sitting on the long seat, because after they knocked me unconscious I didn't know anything more until the motorman come and picked me up.

Cross-examination:

The colored people were ssitting in the front end of the car, in front of the white people. There weren't any white men sitting on any of the seats at all up in front of me the way the car was headed. I don't know who did the shooting; I just know the shooting was done at the back end of the car. I was sitting with my face to the front end of the car, but I had gotten up before the shooting begun. The car was slowing up, it hadn't stopped, and I walked to the door and I had stepped down to the platform and caught hold of the rod, and I heard the report of the gun and I thought it was electricity in the car, and I looked up and I didn't see none, and that was how come me to see the balls, and that was how come me to see the shooting.

I was sitting down when the conductor went back and spoke to those men on the back platform, and I was facing the front of the [fol. 41] car, but I saw the conductor talking to those men on the back platform. I reckon he went back there to collect the fare, when he talked with these men, because they got on at City League. I couldn't tell you how long it took to run all this distance, but I can tell you how come me to notice these men back there. Because there don't any white people ride that car that late at night, generally, you see. That was what made me notice him.

Mrs. Odell Mills, the plaintiff herein, called in her own behalf, being first duly sworn, testified as follows:

Direct examination:

My husband was shot on August 3rd; he died August 4th. I am Mrs. Odell Mills. I am the administratrix of the estate of my deceased husband. I was dependent upon him for support at the time of his death, and we had one child, this little boy here, and he was dependent upon his father for support up to the time of his death, also. My husband was earning about five dollars a day at the time of his death. It took what he was earning to support his family. He was twenty-four years old, and was engaged in the grocery business at Cordova. He had been down working for the Frisco about four days. He was at that time still supporting his family; we had not been separated, or anything of that sort. He was a sober, industrious man, and healthy up to the time he was shot.

(No Cross-examination.)

The foregoing was the evidence, and all the evidence, introduced upon the trial of said cause.

Charge of Court to Jury

Thereupon, the Court charged the jury orally as follows:

[fol. 42] "Gentlemen of the Jury: The plaintiff in this case is Mrs. Odell Mills, the administratrix of the man who was killed, who was shot to death, and she sues the St. Louis-San Francisco Railway Company under the Federal Employers' Liability Act. Her husband was an employee at the time he was killed. The Federal Employers' Liability Act relates only to carriers who are engaged in interstate commerce. (a) So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

"Now, that, as I said, requires you to find two things: first, if the St. Louis-San Francisco Railway Company was engaged in interstate commerce, generally—and that is not disputed, you needn't to bother about that, because there is no contention to the contrary. The other is, that Mr. Mills, at the time of his death, was employed in interstate commerce. That must be true, or else he could not bring a suit under this act at all, which is sued under, whatever right of action he may have otherwise; and you are only concerned in that he has sued under the Federal Act.

"Now, if he were acting as inspector or repairer on a train that was destined to go from Alabama to Mississippi and was injured in the act of making those repairs or of the inspection, then he would be considered to be employed in interstate commerce at the time of his death.

"Now, there is evidence tending to show on the evening of his death, and I believe some of it tends to show at the close of his day's work on the evening of his death, he and Weathers did inspect a [fol. 43] train destined to Amory, Mississippi; and if you believe that to be true, then he would be, so far as he was engaged in that inspection, employed in interstate commerce, because he would be engaged in inspecting an interstate train, a freight train.

"However, he was not hurt in the actual inspection of the train nor was he hurt while he was on the company's premises, but on hi way home. (b) Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot—even though he were one when he was inspecting that train, if he was inspecting it, as testified to by Weathers. Now, ordinarily, his relations to the company would cease when he left its premises. Of course, it might be that a further duty was created by the terms of his employment, or by custom, that he continued to be an employee until he reached his home; (c) and you would have to find that in this case in order to put him in the status of one who had a right to sue under this Act, and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this Act.

"Now, as I say, ordinarily he would cease to be an employee when he left the company's premises. They were bound to furnish him safe egress from their own premises on his way from his work home. Ordinarily it would cease when he left the premises. It might by implied contract, by a custom that existed in that employment, they owed him a duty to protect him further. If that were true, he would [fol. 44] be an employee and an interstate employee just as long as that duty on the part of the company continued. (d) That is to say, if there were a duty that attended while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises.

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before the left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home.

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot. If you fail to find them, or could not find both of them, then you could not give it that character, and your verdict would be for the defendant. Now, that is the first proposition.

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act. That act is for inter-

state carriers only and makes them responsible for any negligence of their appliances or for negligence to any of their employees who are hurt.

"Now, negligence means a departure from the standard of care that an ordinarily prudent person in the same kind of business would exercise under the same circumstances.

[fol. 45] "The company is not an insurer of the safety of employees. A carrier is not, under the Federal Employers' Liability Act—do not insure their safety, do not guarantee that they won't get hurt. The obligation the statute puts on them is to use due care or reasonable care—that of an ordinarily prudent man—to keep their employees from being hurt, and no more; and if they are hurt in spite of that due care, the accident is considered unavoidable, and there is no negligence, and they cannot recover. There must be negligence; and negligence means that departure from the standard of care which an ordinarily prudent man in the same kind of business under like circumstances would exercise.

"Now, negligence also implies that there must be a duty, which has been negligently failed to be observed. Of course, if there is no duty to do a thing, then there cannot be a want of care in not doing it, even though it might be safer if it was done. There must be a duty to do it before a negligent failure to do it could be a lack of due care and give the person injured a right of action.

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt. If there was not, then that ends the case. If there was a duty, then you would have to inquire further whether there was a negligent failure to observe it or whether it was observed all right.

"Now, let us talk of the duty first. It is quite clear that unless there were some unusual circumstances there would be no duty to protect employees, even during a strike, after they had left the company's premises. If a man hired out to take another man's place after he had left it on a strike, and he knew that there was danger of [fol. 46] injury from the strikers whose place he had taken, and there were no assurance on the company's part that he would receive any protection after he left its premises, then he would take his own risk of gettting hurt by the strikers after leaving the company's property; and if he were hurt, then that would be his loss and he could not make the company pay for his injury.

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection, not only while he was on their premises, but while he was going to and fro between their premises and his home. And if they undertook to do that by the express terms of his contract of employment, why then that would impose on them the duty to use due care to that end.

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to de-

termine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home. (k) That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

"As I say, you will have to get at that, if at all, from something unusual, because ordinarily there is no doubt a man can take his own risk after he leaves the company's premises; and there would have to [fol. 47] have been some affirmative action on the part of the company, or a contract which changed the rule of law and gave him the right to say that it was the company's duty to continue to furnish him protection.

"Now, if you find there was no duty, other than the general duty, when he ceases to be on the premises, then, of course, the plaintiff's case ends, because, of course, if there was no duty, there could be no negligence. Negligence depends upon a duty; and if there were no duty, then the failure to do it could not be negligence, even though that might have been safer for the employee for it to have been done or he may not have been injured if that had been done. (l) You must find there was a duty in order to predicate negligence.

"If you find there was a duty, then the next question would be whether the duty was properly observed or whether there was negligence in its observance. Of course, if there were a duty to protect and they gave him protection which the law says is such as due care required, then there could be no negligence; and being no negligence, even though the duty existed, then there could be no recovery on the part of the plaintiff, because, as I have already told you, she must recover by virtue of there being negligence, because negligence is the basis of the Federal Employers' Liability Act for recovery.

"Now, as I said before, negligence means a departure from due care that an ordinary prudent person would exercise in like business under similar circumstances.

"Now, the negligence could be that of any employee of the St. Louis-San Francisco Railway Company. It could have been of Cantrell, if Cantrell had been guilty of negligence; that is to say, his grade of service, if he had been negligent, if he had been negligent and had caused the plaintiff to suffer because he was negligent, then [fol. 48] that would be the kind of negligence or negligence of a kind that would justify recovery under the Employers' Liability Act, even though it was disregarded. But, as I say here, what happened on the street car is so vague that it is impossible to say that Cantrell either did or failed to do something that he should have done, or should not have done, or that any injury was done to Mr. Mills on that account, that is, his being shot, was caused by that. There is nothing to submit to a jury as to Cantrell's negligence on the instant occasion; they are all instances of suspicion, but no facts that anything that he could have done, or he didn't do, or anything that

would have avoided the injury to Mr. Mills would have been possible for him under the circumstances. So I don't leave the case to you on the idea that Cantrell was incompetent and was negligent. I will say whether he was competent or not makes no difference, unless he was negligent at the time of this duty in a way that allowed Mills to be shot and that would have been avoided had he exercised due care. But it is all guesswork, it seems to me, as to how the shooting occurred. Therefore, I will charge you that you cannot give the plaintiff any damages because of Cantrell's supposed negligence at the time of the shooting.

(m) "Now, the other contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

"Now, as I said at the outset, the railway company doesn't have to guarantee or insure the safety of its employees on occasions like this or on any other occasions; it only has to do what a reasonably pru- [fol. 49] dent person would do under like circumstances.

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

(o) The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills. And Wilkins is not to be tested by the test of infallibility; he is not required to act as a man who makes no mistakes; he is required to act, however, as a reasonably prudent person would in his business under like circumstances. If he does, though he acts mistakenly, then he is guilty of no negligence. If he does not, if he acts as a reasonably prudent person would not act, then he would be guilty of negligence. Now, that would depend on whether he could have reasonably anticipated danger to the extent of determining if one guard was sufficient to guard Weathers and Mills. As I understand, up to this time they had been in the habit of sending but one guard, and there had been no assaults and no violence. So, as far as the past history of the strike was concerned, there was nothing claimed to charge him with any knowledge of any assault like to be committed on him, and, therefore, that more than one guard was necessary; I mean anything in the way of violence before this time. There is, however, testimony—that of Mr. Weathers—that he went with the deceased, Mills, and with Cantrell, and reported a conversation that he had overheard over the telephone between a switchman and somebody on the outside, and had reported also at a previous time that threats had been made to get him, and [fol. 50] he says that Wilkins, who was in charge of the guards at East Thomas yard, said it was all a bluff and that there was no danger, and that he permitted the men to go home with Cantrell and with Cantrell alone.

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them; and that depends altogether upon what you believe a reasonably prudent man would have done under the same circumstances, what he would have anticipated was the danger, how great he would have anticipated the danger was, and the circumstances, from the reports made to him. If you believe that a reasonably prudent man would have acted as he did and would have sent the men along or permitted them to go along with Cantrell and nobody else, then no negligence could be predicated on Wilkins' part. (q) On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one guard, then that failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not. That is entirely a question of fact, and all I do is to lay down the standard, namely, that the care exacted is that of a reasonably prudent man under like circumstances when in a like situation.

[fol. 51] "Now, if you are reasonably satisfied as I say, that that degree of care was exercised by Wilkins, under the circumstances, then there would be no negligence, and the defendant would be entitled to your verdict also on that count. (r) On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and Mills, and you find that to be negligence on his part, (s) then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death. Of course, negligence don't amount to anything unless it causes the injury, in a civil suit. This suit is for damages for the death of Mr. Mills, and any negligence that did not result in his death would be entirely aside from the question in a civil case like this; there must be negligence, and it must be the proximate cause, the direct cause, of his death, in order to be recoverable in the interest of the plaintiff.

"Now, whether that—in other words, the proposition as to the proximate cause would be this: If you have hitherto found that there was a duty to furnish protection in favor of the employees, and have found that there was a negligent failure to furnish such protection on the part of Wilkins, then you would next inquire whether that was a direct cause of plaintiff's intestate's death. If you believe—the burden is on the plaintiff to satisfy you that it was; you can't speculate, but you must find, not with entire certainty, but with reasonable certainty in your finding—(t) if you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also

find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal [fol. 52] relation in the failure to furnish it and the accident resulting in the death of the intestate. On the other hand, if you are not able to reasonably say from the evidence that a larger guard, if one was required in the exercise of due care, would have prevented the assault and would have prevented the plaintiff's intestate from being shot, then you would have to find for the defendant in any event, because there would be no causal relation between the failure to furnish a greater guard and the death of plaintiff's intestate, which is absolutely essential for the plaintiff to recover.

"Now, that comes to the end of it. If you find that the plaintiff was an interstate employee up to the time he was shot—the plaintiff's intestate—if you find it was the duty of the defendant, the railway company, to afford protection against assault by strikers and that that duty went beyond their premises and on his return to his home, and if you find there was a negligent failure on the part of Wilkins to give him that protection by failing to furnish more guards, and if you find that that was the proximate cause of the plaintiff's intestate's death, then the plaintiff would be entitled to a verdict in damages. If any one of those things are not found by you, then the defendant would be entitled to a verdict. Of course, if you find a verdict for the defendant you don't enter into the question of damages.

"If you find for the plaintiff, then it would be your duty next to consider what damages she is entitled to.

"Now, under this Federal Employers' Liability Act the damages are altogether compensatory. They are not to punish the defendant or to make an example of the defendant or anything like that. They are meant to compensate the plaintiff for the pecuniary [fol. 53] loss that she has received or suffered from the death of her husband. And there is another element that I may refer to incidentally, and that is to be considered: what would be a reasonable compensation for the suffering of the decedent from the time he was shot until he died—which if you believe would reasonably compensate him for the pain that he suffered from the time he was shot until he died. That is one of them. The other element is to furnish a substitute for him to his dependent next of kin for what wages you believe he would have earned and contributed to their support during his expectancy of life—during the balance of life—during the balance of his life, as shown by his expectancy, and during their joint lives. Now, you can see that is a right difficult problem to get at, but that is a question that the jury must decide in their own minds if they come to the question of damages. He was earning five dollars a day for a short time before his death; and the evidence shows prior to that time he was engaged in running a store. Of course, there is no data on what he earned running a store. You would have to rely on what he earned at the time he was a car repairer and in which he was engaged for three or four days. There is evidence that he was healthy and industrious and sober and a regular worker and, I believe, competent

to do this job that he was doing. Now, you see the theory of this awarding of damages is to give the dependent next of kin—in this case the widow and the little boy—an amount that would be equivalent to what he would have furnished from his wages toward their support during their joint lives. Now, of course, what he earned and spent on himself you wouldn't consider, because that he never did contribute in his lifetime to their support, seeing he has spent [fol. 54] it on himself. Therefore, this five dollars a day you would leave out of consideration. Whatever amount you would believe it took to support them, and only that which he took out of the five dollars to contribute to the support of the wife and child; and then you would look to the support of the wife and child and their condition and expectancy and so forth; and you would not only say how long the husband would have lived, but how long he would have lived together with his wife and child, for that is the only time that he would have furnished them any support in the way of contributions. Of course, after they died he would no longer support them. So you will have to, in some way, the best you can, arrive at the period of time that he would have been living, and he or they, one or the other, would also be living. And you would not allow them, of course a sum of money which, put out at interest, would be equivalent to what he allowed them each year. That would not be fair to the railroad, because if you allowed it that way, they would get the whole benefit of his contributing capacity and also the principal sum out of which that income was paid, which they wouldn't get at all, of course, if he had lived. If he had spent all of his money on them, he would not have saved money in his life time; when he died his support to them, in a pecuniary way, would be at an end. On the other hand, if you acted on the idea that you would find some sum which, if put out at interest, would be what he contributed in support to his wife and child, and give them that sum, and then they would get this sum during his expectancy—which is all they would get in the case of his living; but in that instance they would get the principal sum, which they would not, of course, get had he lived and died at the end of the course of his natural life. Of course, at the time he died [fol. 55] he would not have had anything to leave out of his wages, having spent it all for their support during his lifetime. Now, then, under this Federal law, it is your duty to find, not only what would be reasonable compensation in that sense, his contributing capacity to his wife and child had he not been killed, during his life and their lives, but also to make a division of whatever sum you arrive at between the wife and child, who are the next of kin in this particular instance. You not only have to find an amount which would represent this contributing capacity, but you have to make a division of that amount, based on that amount, so much in favor of the wife and so much in favor of the child.

"Now, the burden is on the plaintiff to reasonably satisfy you of the things that are necessary to make her right of action complete, and, as I have said to you before, not beyond a reasonable doubt, but to reasonably satisfy you from a fair preponderance of the

evidence that her husband was an interstate employee when he was shot, that there was a duty to protect him on the part of the railroad company at such time, that there was a negligent breach of that duty on the part of Wilkins in not sending more guards to protect him, and that that negligent breach of duty was the direct and proximate cause of his death. As I have said to you, if you are not reasonably satisfied of every one of those four propositions, then the plaintiff has no right of action. If any one of them fails to be proven to your reasonable satisfaction, then the plaintiff's cause of action fails, because the burden is on her to sustain them all.

"Now, if you find for the plaintiff your verdict would be in this form: we, the jury, find for the plaintiff and assess her damages at whatever sum you arrive at as reasonable compensation for damages [fol. 56] to herself and child; and then you would say, we, the jury, find for plaintiff and assess her damages at that sum and divide the damages as follows between the widow and the child; and then you would just say, to the widow so much—what is the child's name?"

Mr. Harsh: Kermit. K-e-r-m-i-t.

The Court: And the widow's name is Odell, isn't it?

Mr. Harsh: Yes, sir.

(The Court thereupon further charged the jury):

"You would say to Odell Mills so much, and to Kermit Mills so much; and sign by the foreman. If you find for the defendant, the form of your verdict would be: we, the jury, find for the defendant."

Defendant's Exceptions to Charge to Jury

At the close of the Court's oral charge and in open court, before the jury retired, the defendant excepted separately and severally, to each of the following separate and several portions of the oral charge of the Court, lettered from (a) to (t):

(a) So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Federal Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

(b) Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot. * * *

(c) And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, [fol. 57] and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act.

(d) That is to say, if there were a duty that attended while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises.

(e) Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home.

(f) If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot.

(g) The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act.

(h) Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt.

(i) Of course, that rule could be modified by a contract made between him and the company that they would protect him or give [fol. 58] him protection, not only while he was on their premises, but while he was going to and fro between their premises and home.

(j) So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home.

(k) That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

(l) You must find there was a duty in order to predicate negligence.

(m) Now, the contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

(n) Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

[fol. 59] (o) The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills.

(p) Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them; * * *.

(q) On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he could have sent more guards than one guard, then that failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not.

(r) On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part, * * *.

(s) Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death.

(t) If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that [fol. 60] that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate.

Defendant's Requested Instruction to Jury

After the close of all the evidence and following the charge of the Court, and before the jury retired, and at the time when the Court requested the parties to submit in writing, charges desired to be given, the defendant requested in writing the following written charge, which said charge was by the Court refused, and upon the same the Honorable W. I. Grubb, presiding Judge, wrote the words, "Refused. W. I. Grubb, Judge," to which said refusal by the Court, of said charge, the defendant then and there in open court, duly and legally excepted, the said charge being as follows:

"(1) If the jury believe the evidence your verdict must be for the defendant."

Thereafter, on the 22nd day of March, 1924, the defendant duly presented to the Court its motion for a new trial, upon substantially the same grounds shown by the assignments of error filed in this cause by the defendant (plaintiff in error), which said motion was by the court overruled on the 22nd day of March, 1924. As a part of the order of the Court overruling and denying the motion for new trial, it was also ordered by the Court that the defendant should be, and it was thereby allowed until May 26th, 1924, within which to present its bill of exceptions and sue out a writ of error in said cause.

[fol. 61] ORDER SETTLING BILL OF EXCEPTIONS

The foregoing is accordingly presented by the defendant and signed as a proper bill of exceptions in said cause, and ordered to be filed as part of the record herein within the time fixed by law and the rules and practice of this Court.

This 19th day of May, 1924.

W. I. Grubb, U. S. District Judge.

O. K. by G. R. Harsh.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 19, 1924

And now comes St. Louis-San Francisco Railway Company, defendant herein, and says that on the 12th day of March, 1924, this Court entered a judgment herein in favor of the plaintiff and against the defendant, on the verdict of the jury trying the said cause, in the sum of thirteen thousand seven — and fifty dollars ($13,750), in which judgment and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which are filed with this petition.

Wherefore, this defendant prays, that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the [fol. 63] Fifth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

Presented this 19th day of May, 1924.

W. I. Grubb, United States District Judge.

In United States District Court

[Title omitted]

Assignments of Error—Filed May 19, 1924

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of the cause, to-wit:

(1) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness L. L. Jenkins, on the direct examination:

[fol. 64] "Q. About how many men were there on strike at that time, if you have any idea; were there considerable or few?"

(2) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness L. L. Jenkins, on the direct examination:

"Q. Well, did you report that to the Company?"

(3) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on the direct examination:

"Q. Describe as best you can, how he acted as guard?"

(4) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on the direct examination:

"Q. Well, what was said by him in the presence of Mr. Mills?"

(5) The Court erred in overruling the objection of the defendant to the following question asked the plaintiff's witness A. D. Weathers, on direct examination:

"Q. And what did he say?"

(6) The Court erred in the following portion of its oral charge to the jury:

(a) "So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death."

[fol. 65] (7) The Court erred in the following portion of its oral charge to the jury:

(b) "Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of

work and to his home in order that he remain an interstate employee when he was shot."

(8) The Court erred in the following portion of its oral charge to the jury:

(e) "And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act."

(9) The Court erred in the following portion of its oral charge to the jury:

(d) "That is to say, if there were a duty that attended him while he was on his way home on the part of the company to protect him and to give him protection, then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interstate work at the company's premises."

(10) The Court erred in the following portion of its oral charge to the jury:

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce or employed [fol. 66] in interstate commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the limits of the company's property and to his home."

(11) The Court erred in the following portion of its oral charge to the jury:

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot."

(12) The Court erred in the following portion of its oral charge to the jury:

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act."

(13) The Court erred in the following portion of its oral charge to the jury:

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt."

(14) The Court erred in the following portion of its oral charge to the jury:

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection, not only while he was on their premises, but while [fol. 67] he was going to and fro between their premises and his home."

(15) The Court erred in the following portion of its oral charge to the jury:

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home."

(16) The Court erred in the following portion of its oral charge to the jury:

(k) "That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertaking a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip."

(17) The Court erred in the following portion of its oral charge to the jury:

(l) "You must find there was a duty in order to predicate negligence."

(18) The Court erred in the following portion of its oral charge to the jury:

(m) "Now, the other contention of the plaintiff is this: She says [fol. 68] that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that that was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed."

(19) The Court erred in the following portion of its oral charge to the jury:

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas."

(20) The Court erred in the following portion of its oral charge to the jury:

(o) "The question would be, it seems to me, whether Wilkins, under the circumstances sent enough guards with these two men, Weathers and Mills."

(21) The Court erred in the following portion of its oral charge to the jury:

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them: * * *."

(22) The Court erred in the following portion of its oral charge to the jury:

[fol. 69] (q) "On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one guard, then the failure to send more guards than one guard, you might say was—you might find was negligence on the part of Wilkins. It is for you to say whether it was or not."

(23) The Court erred in the following portion of its oral charge to the jury:

(r) "On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part."

(24) The Court erred in the following portion of its oral charge to the jury:

(s) "Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death."

(25) The Court erred in the following portion of its oral charge to the jury:

(t) "If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate."

[fol. 70] (26) The Court erred in refusing to give at the request of the defendant, the following written charge:

"(1) If the jury believe the evidence, your verdict must be for the defendant."

Wherefore, the defendant prays, that the judgment of the District Court may be reversed.

Cabaniss, Johnston, Cocke & Cabaniss, Attorneys for Defendant.

Presented this 19th day of May, 1924, with petition for writ of error.

W. I. Grubb, United States District Judge.

In United States District Court.

[Title omitted]

Order Allowing Writ of Error—Filed May 19, 1924

This 19th day of May, 1924, came the defendant by its attorneys, and filed herein and presented to the Court its petition praying for [fol. 71] the allowance of a writ of error, and the assignments of error intended to be urged by it, praying also that a transcript of the record, proceedings, and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, and that such other and further proceedings be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, upon the defendant giving bond according to law, in the sum of eighteen thousand dollars ($18,000), which shall operate as a supersedeas bond.

W. I. Grubb, United States District Judge.

[fols. 72 & 73] Bond on Writ of Error for $18,000—Approved and filed May 19, 1924; omitted in printing

[fol. 74] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Fifth Judical Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Odell Mills, as Administratrix of the estate of Ira S. Mills, Deceased, and St. Louis-San Francisco Railway Company a manifest error hath happened, to the great damage of the said St. Louis-San Francisco Railway Company as by its complaint appears We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be [fol. 75] done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 19 day of May, in the year of our Lord one thousand nine hundred and twenty-four.

Chas. J. Allison, Clerk of the U. S. District Court, Northern District of Alabama. (Seal.)

Allowed by W. I. Grubb, Judge of the United States District Court, Northern District of Alabama.

[fol. 76] CITATION—In usual form, showing service on Harsh, Harsh & Harsh et al.; omitted in printing

[fol. 77] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Northern District of Alabama:

I, Chas. J. Allison, Clerk of the District Court of the United States for the Northern District of Alabama, Southern Division, do hereby certify that the foregoing pages numbered from one (1) to seventy-six (76), both inclusive, is a full, true and correct transcript of the record in the matter of St. Louis-San Francisco Railway Company, a corporation, plaintiff in error, vs. Odell Mills, as Administratrix of Estate of Ira S. Mills, Deceased, defendant in error, as fully as the same appears of record and on file in my office.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of said Court on this the 9 day of June, A. D. 1924.

Chas. J. Allison, Clerk United States Court, Northern District of Alabama.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4366

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

versus

ODELL MILLS, as Administratrix of Estate of Ira S. Mills, Deceased

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by W. R. C. Cocke, Esq., for plaintiff in error, and G. R. Harsh, Esq., for defendant in error, was submitted to the Court.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

W. R. C. Cocke, (Cabaniss, Johnston, Cocke & Cabaniss, and W. R. C. Cocke on the brief), for Plaintiff in Error.

G. R. Harsh, (Harsh, Harsh & Harsh on the brief), for Defendant in Error.

Before Walker and Bryan, Circuit Judges, and Estes, District Judge

OPINION—Filed December 17, 1924

WALKER, Circuit Judge:

This was an action under the Federal Employers' Liability Act to recover damages for the death of Ira S. Mills, an employee of the

plaintiff in error, a railway company, the death of the employee being attributed to negligence chargeable against his employer. In the trial there was evidence to the following effect: The employee entered the service of the employer on the Monday next preceding the Thursday night when he was shot, as stated below. His work was [fol. 80] that of a car inspector at the employer's East Thomas Yards, in Birmingham, Alabama, and included the inspection of both intrastate and interstate trains. Prior to and at the time the employee entered upon his service and while he was engaged therein, a strike of the employer's former employees was in progress, and during all that time the employer furnished guards to guard the men who took the places of the strikers, the men being guarded while they were coming from their places of residence to their place of work, while they were at work, and while they were returning to their places of residence. Between ten and eleven o'clock Thursday night the employee and another car inspector got through inspecting a train that was going to Amory, Mississippi. They did no work after inspecting that train except to put in their proper place the lanterns and other articles they had been using, and make and turn into the office their reports. Soon thereafter the two car inspectors, accompanied by a guard who had been assigned to take them to their homes in the City of Birmingham, left the yards, walked a distance of about a half a mile to where they were to take a street car, and got on a car at that place. Soon after they got on the car one of several men who were on the rear platform came into the car, put his hand on the shoulder of Weathers, one of the two car inspectors, and, with an oath, told him to get off. About that time several shots were fired from the rear platform, some of which struck Mills, and he died from the wounds the next day. Prior to the shooting threats of personal violence to the men who were working were made by strikers, and the fact that such threats were made was reported to the employer's employee Wilkins, who was in charge or command of the guards. The assign- [fol. 81] ment of a guard to take the two car inspectors to their homes was made by Wilkins, the boss of the guards, after such boss had been informed during the same Thursday that the person so assigned, while acting as a guard, had been nervous and scared when there were some pickets near the place where an employee he was guarding was at work, and had left the employee he was guarding and gone back to the employer's office. When that guard got on the street car with the two car inspectors the butt of his pistol was showing from under his coat. One of the men who did the shooting looked at the guard and at the butt of his pistol, and at one of his companions, and laughed.

The court's charge to the jury contained instructions to the following effect: If there was a duty on the employer to furnish protection to the employee while he was on his way home from doing interstate work on the employer's premises a violation of that duty would be a violation of the employer's duty to an interstate employee. If by custom the employer had been furnishing protection to its employees for such length of time as would induce the em-

ployees to believe that they would be protected, then it would be a question of fact for the jury to determine whether out of that custom or habit a duty would or would not spring up to furnish protection, not only on the employer's premises, but on the journey of the employee to his home. If you believe that the reports testified to were made to Wilkins, and that those reports were of such a character as would have made a reasonably prudent man reinforce the guard, and if you believe from all the circumstances and situation of the strike, that a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one, then you might find that there was negli- [fol. 82] gence on the part of Wilkins. If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then that could show that there was a causal relation between the failure to furnish a greater guard and the accident resulting in the death of the intestate. The court refused to give the following charge requested by the defendant: "If the jury believe the evidence your verdict must be for the defendant." The above mentioned rulings are presented for review.

The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. Erie R. R. Co. v. Winfield, 244 U. S. 170. Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with his employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment. Wilson v. Banner Lumber Co., 32 So. 460; Doyle v. Fitchburg R. Co., 25 L. R. A. 157. The evidence as to the circumstances under which the employee entered upon and remained in the employer's service furnished support for an inference that the employer's undertaking to furnish the employee protection during the trip from his home to the place of work and from the place of work back to his home was part of the consideration moving to the employee for the service he rendered. [fol. 83] It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home.

In behalf of the employer it is contended that, though it negligently failed to comply with an obligation it incurred to furnish the employee protection from threatened acts of violence by strikers

or their sympathizers which, under the circumstances, might reasonably have been anticipated, that negligence was not a proximate cause of the employee's death, because his death would not have occurred but for the supervening of an independent and disconnected agency. Negligence properly may be regarded as the proximate cause of an injury if it appears that the injury was the natural and probable consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469; Atchison etc. Railway Co. [fol. 84] v. Stone, 213 U. S. 1, 9; Delaware & Hudson Co. v. Ketz, 233 Fed. 31. If the employer negligently failed to perform a duty incurred by it to protect the deceased from assault or personal violence while on the trip from his place of work to his home, and if in the circumstances of that misconduct a natural and probable consequence of it was a reasonably avoidable exposure of the deceased to personal violence during that trip, and in the light of those circumstances the employer ought to have foreseen that such misconduct on its part was calculated to invite or induce the peril to the deceased which resulted in his injury and death, the fact that the source of that peril was an independent agency would not keep the deceased's death from properly being held to be the result of his employer's negligence. Evidence adduced was such as to warrant the submission to the jury under appropriate instructions of the questions whether the employee was or was not under a duty to guard the employee while the latter was returning from his place of work to his home, whether the employer did or did not negligently fail to perform that duty, and whether, if it was negligent in that regard, its negligence did or did not occur under such circumstances as to make the death of the employee in the way it occurred a result of that negligence.

We conclude that the court did not err in refusing to give the above set out charge requested by the defendant, or in its instructions to the jury as to questions raised by the pleadings and evidence in the case.

The judgment is affirmed.

[fol. 85] In United States Circuit Court of Appeals

[Title omitted]

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the St. Louis-San Francisco Railway Company, and the surety on the writ of error bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 86] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered from 78 to 85 next preceeding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered 4366, wherein St. Louis-San Francisco Railway Company is plaintiff in error and Odell Mills, as Administratrix of the Estate of Ira S. Mills, Deceased, is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 77 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 31st day of December, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 87] Supreme Court of the United States

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Order Granting Petition for Certiorari—March 9, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.